IN

THE

SUPREME COURT OF THE UNITED STATES

October Term, 1931 No. 1357

[redacted],

Appellant,

vs.

[redacted], Commissioner of Motor Vehicles,

Appellee.

APPEAL FROM THE SUPREME COURT
OF THE STATE OF WISCONSIN

STATEMENT AS TO JURISDICTION

[redacted]

[redacted]

Attorney for Appellant.

INDEX

	Page
Statement as to Jurisdiction	2
Opinion below	2
Jurisdiction	2
Questions Presented	3
Statement of the Case	4
The Questions Presented are Substantial	5
A. The Constitutional Question	5
B. Whether the Federal Question was decided below is itself a Federal Question for which this Court should note jurisdiction	7
Conclusion	10

CITATIONS

Abie State Bank v. Bryan, 282 U.S. 755, 51 S. Ct. 252, 75 L. ed 690 (1931)	3, 7
Ancient Egyptian Arabic Order of the Nobles of the Mystic Shrine v. Michaux, 279 U.S. 737, 49 S. Ct. 485, 73 L. ed. 931 (1928)	6
Appleby v. New York, 271 U.S. 364, 46 S. Ct. 581, 70 L. ed 1009 (1925)	3, 6, 7

Page

Chicago, Burlington & Q, Ry. Co. v. Illinois, 200 U.S. 561, 26 S.Ct. 341 50 L. ed. 596 (1903) 5,6

Consolidated Turnpike Co. v. Norfolk & Ocean View Ry. Co., 228 U.S. 596, 33 S. Ct. 605, 57 L. ed. 982 (1913) 6

Demorest v. City Bank Co., 321 U.S. 36, 64 S. Ct. 384, 88 L. ed 526 (1944) 6

Griffith v. Connecticut, 218 U.S. 563, 31 S. Ct. 132, 54 L. ed 1151 (1910)..... 6

Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678, 14 L. ed. 2d 510 (1965) 7

Henderson Bridge Co. v. Henderson City, 173 U.S. 592, 19 S. Ct. 553, 43 L. ed 823 (1898)..... 6

Lehon v. City of Atlanta, 242 U.S. 53, 37 S. Ct. 70, 61 L. Ed 145 (1916) 3,6

Lovell v. Griffin, 303 U.S. 444, 58 S. Ct 666, 82 L. ed 949 (1937) 3,7

N.A.A.C.P. v. Alabama, 357 U.S. 449, 78 S. Ct. 1163, 2 L. ed. 2d 1488 (1958) 10

Page

Offield v. New York, N.H. & H.R. Co.,
203 U.S. 372, 27 S. Ct. 72, 51 L. ed
231 (1903) 3,6

State v. Redmon,
134 Wis. 89, 114 N.W. 451 (1907) 8,10

Staub v. City of Baxley,
78 S. Ct. 277, 355 U.S. 313 2 L.ed 2d
302 (1958) 3

Southwestern Bell Tel. Co. v. Oklahoma,
303 U.S. 206, 58 S. Ct. 528, 82 L. ed.
751 (1938) 7

Titus v. Wallick,
306 U. S. 282, 59 S. Ct. 557, 83 L. ed
653 (1939) 3,10

Ward v. Love County,
253 U.S. 17, 40 S. Ct. 419, 64 L. ed.
751 (1920) 3

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968 No.

JAMES BISENIUS,

Appellant,

vs.

JAMES KARNS, Commissioner of Motor Vehicles

Appellee.

APPEAL FROM THE SUPREME COURT
OF THE STATE OF WISCONSIN

STATEMENT AS TO JURISDICTION

Appeal from the Supreme Court of the State of Wisconsin, ____Wis 2d___, 165 N.W. 2d 377 (1969). The decision of the Circuit Court of Dane County of May 14, 1968 is unreported and is appended hereto.

STATEMENT AS TO JURISDICTION

The Appellant pursuant to Rules 13(2) and 15 of the United States Supreme Court files this, his statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final order and decision in question, and should exercise such jurisdiction.

OPINION BELOW

The circuit court delivered a written opinion and made findings of fact and conclusions of law which are included in the appendix. The decision of the Wisconsin Supreme Court is also included in the appendix.

JURISDICTION

The appeal herein is from a final decree made and entered by the Supreme Court on the day of its decision, Mar. 7, 1969, in a suit for a declaratory judgment to render sec. 347.485 (1) (a) of the Wisconsin Statutes unconstitutional as violative of federally protected rights of plaintiff secured by the due process clause of the 14th amendment of the Federal Constitution. Notice of appeal was filed in the Supreme Court of the State of Wisconsin on April 16, 1969, due service of the same having been made on the Attorney General of the State of Wisconsin on April 9, 1969. The Supreme Court of the United States has jurisdiction to review by direct appeal the judgment complained of by provisions of 28 U.S.C. 1257(2).

The following decisions are believed to sustain the Jurisdiction of the Supreme Court to review the

judgment on direct appeal in this case:

Appleby v. N.Y., 271 U.S. 364, 46 S.Ct. 581, 70 L.ed. 1009 (1925).
Lovell v. Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.ed. 949 (1937).
Ward v. Love County, 253 U.S. 17, 40 S.Ct. 419, 64 L.ed. 751 (1920).
Lehon v. City of Atlanta, 242 U.S. 53, 37 S.Ct. 70, 61 L.ed. 145 (1916).
Offield v. N.Y.N.H.&H.R.Co., 203 U.S. 372, 27 S.Ct. 72, 51 L.ed. 231 (1903).
Abie State Bank v. Bryan, 282 U.S. 755, 51 S.Ct. 252, 75 L.ed. 690 (1931).
Staub v. City of Baxley, 78 S.Ct. 277, 355 U.S. 313, 2 L.ed. 2d 302 (1958).
Titus v. Wallick, 306 U.S. 282, 59 S.Ct. 557, 83 L.ed. 653 (1939).

The Wisconsin Statute involved is the Motorcycle Helmet law, effective July 1, 1968 sec. 347.485(1)(a) of the Wisconsin Statutes, vol. 2, p. 3900 (1967):

347.485 - Protective Headgear for Motorcyclists -

"(1)(a) No person shall operate or ride upon a motor driven cycle on any highway unless such person is wearing protective headgear of a type and in the manner approved by the commissioner."

The decision of the State Supreme Court as involves other statutes whose constitutionality was questioned below, is not being appealed.

QUESTIONS PRESENTED

The questions presented on this appeal are:

a. Is sec. 347.485(1) (a) such a restriction upon individual liberty as to violate the rights of appellant under the due process clause of the 14th amendment to the Federal Constitution?

b. Does sec. 347.485(1) (a) exceed the limits of the police power of the state and thereby infringe upon the rights of appellant protected from state action by the due process clause of the 14th amendment to the Federal Constitution?

STATEMENT OF THE CASE

Appellant is the owner and operator of a motorcycle and lives in the County of Milwaukee, State of Wisconsin. On July 1, 1968 Sec. 347.485(1) (a) of the Wisconsin Statutes, Vol 2, went into effect requiring appellant and all other operators of motorcycles to wear protective headgear while operating motorcycles on the public highways of Wisconsin. Prior to July 1, 1968 appellant filed a declaratory Judgment suit challenging the constitutionality of 347.485 and other statutes. In the second amended complaint filed by appellant in the Circuit Court of Dane County (R. 110-112, A-Ap. p. 116) plaintiff alleged by pleading that sec. 347.485(1) (a) of the Wisconsin Statutes, Vol 2, laws of 1967 and other statutes were invalid as violative of Federally protected Constitutional Rights under the 14th amendment, (paragraphs 3a and 4) as vague, and violative of the rights protected from state action under the due process and equal protection clauses. The Circuit Court heard the case on May 13, 1968 and in a written decision dated June 12, 1968 ruled that the statutes, including 347.485(1) (a)

did not violate the equal protection and due process clauses of the 14th amendment as appellant alleged. (R. 101-106, A-Ap.pp. 107-116).

On Appeal to the Wisconsin Supreme Court appellant asserted that the statutes in question violated rights of appellant protected from infringment by state action by the due process clause of the 14th amendment and that as such, the statutes were outside the scope of the police power of the state. Appellant did not assert equal protection invalidity in the Wisconsin Supreme Court. (R. 134, A-Ap. pp. 134-135). The Supreme Court of the State of Wisconsin in its decision and judgment of Mar. 7, 1969 ruled that 347.485(1) (a) was valid (R. 141-144, A-Ap.pp. 143-147). The decision of the Wisconsin Supreme Court became a final Judgment of that Court on Mar. 7, 1969.

THE FEDERAL QUESTION IS SUBSTANTIAL

A. The Constitutional Question-

Plaintiff asserted his ground of 14th amendment invalidity before both the Circuit Court (R. 101-106) and Supreme Court (R. 142, 154-155). When such a claim of a federal right is thus set up from the outset, (especially in a declaratory judgment suit) it is deemed to dominate every part of the case. Thereafter a failure to recognize such Federal right with the decision of the state court on some ground of general or local law has the same effect as if the claim of Federal Right were denied,' and this is sufficient for the United States Supreme Court to note jurisdiction. Chicago, Burlington & Q.R. Co. v. Illinois, 200 U.S. 561, , 26 S.Ct., 341, 50 L.ed. 596 (1903). When

such a claim of right is denied by the State court of last resort, either implicitly as in Chicago etc., supra, or explicitly as in Demorest v. City Bank Co., 321 U.S. 36, 64 S.Ct. 384, 88 L.ed. 526 (1944), Henderson Bridge Co. v. Henderson City, 173 U.S. 592, 19 S.Ct. 553, 43 L.ed. 823 (1898), Ancient Egyptian Arabic Order of the Nobles of the Mystic Shrine v. Michaux, 279 U.S. 737, 49 S.Ct. 485, 73 L.ed. 931 (1928), jurisdiction should be noted if the question is substantial. Here, the record shows that in Wisconsin alone more than 60,000 motorcycles are licensed (R. 117, 125) and the number increasing yearly. On a nationwide basis this is much greater.

Where, in addition, the basic question underlying the challenge to the power of the state, through its police powers, to enact such a law is whether a state can compel a citizen to protect himself without transgressing due process limitations, this being an issue never before considered by the United States Supreme Court, the uniqueness of this Federal Question should invoke the jurisdiction of the Court. Griffith v. Connecticut, 218 U.S. 563, 572, 31 S.Ct. 132, 134, 54 L.ed. 1151, 1155 (1910), they obviously not being frivolous in this, a declaratory judgment suit. Offield v. N.Y.N.H. & H.R. Co, 203 U.S. 372, 27 S.Ct. 72, 51 L.ed. 231 (1903). See also Lehon v. City of Atlanta, 242 U.S. 53, 37 S.Ct. 70, 61 L.ed. 145 (1916) and Consolidated Turnpike Co. v. Norfolk and Ocean View Ry. Co., 228 U.S. 596, 33 S.Ct. 605, 57 L.ed. 982 (1913).

The United States Supreme Court cannot enforce the guaranty of the Federal Constitution unless it gives independent consideration and judgment to the constitutional issues asserted below. Appleby

v. N.Y., 271 U.S. 364, 380, 46 S.Ct., 581, 70 L.ed. 1009 (1925).

B. Whether the Federal Question was decided below is in itself a Federal Question for which the Court should note Jurisdiction.

When a state statute is challenged as violating federally protected constitutional rights, especially in a declaratory judgment suit where the prayer for relief is the voiding of the law, the deciding of the Federal question is a necessity to the determination of the cause and the judgment which was rendered, could not have been given without a decision of the Federal Question. Southwestern Bell Tel. Co. v. Oklahoma, 303 U.S. 206, 58 S.Ct. 528, 82 L.ed. 751 (1938). Here appellant asserts that the Court below, not expressing the rulings of the Supreme Court of the United States, decided the issues on the basis of general legal concepts and theory rather than on Federally enunciated constitutional guidelines as were made in Griswold v. Connecticut, (1965), 381 U.S. 479, 85 S.Ct. 1678, 14 L.ed. 2d 510, a most recent pronouncement of the United States Supreme Court in this area. Whether or not such Federal Question was decided or not, by the Supreme Court of the state is in itself a Federal Question for which this court should note jurisdiction. Lovell v. Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.ed. 949 (1937). The most that can possibly be said in favor of the supposed proposition that the State Supreme Court did decide or did not decide the Federal Question is that the Federal Question was so interwoven with other non-federal grounds of decision as to be inextricable. In such instance, the United States Supreme Court notes jurisdiction. Abie State Bank v. Bryan, 282 U.S. 765, 51 S.Ct. 252, 75 L.ed. 690 (1931).

Furthermore, Appellant notes that the State Supreme Court did not follow, as did the Circuit Court, Wisconsin case law criteria in deciding the constitutional issues, thus inferring that the grounds of denial of the right in the State Court were Federal in their scope and nature, or that the court attempted to evade established state law to set up a non federal ground of denial of the right. The Wisconsin law is encapsuled in a line of decision springing from the early landmark case of State v. Redmon, 134 Wis. 89, 114 N.W. 451 (1907), which the trial court relied on in deciding the constitutional questions presented. In Redmon the Wisconsin law was thus stated (p. 101):

> "A legislative enactment approved by the executive and duly published is not necessarily a law binding on any one in respect to his liberty, his business or his property. It is such if it is susceptible of passing the judicial test of whether it is warranted by the fundamental law which our constitutional system contemplates may be applied to all such enactments. Perhaps the thought sometimes expressed that the vital feature suggested which every good law must possess is not fully appreciated by the law making power, as it ought to be, leading to the infractions of some express limitation as well as that broad general restriction of legislative power contained in the declaration that:
>
> > "...all men are born equally free and independent and have certain inherent rights; among these are life, liberty and the pursuit of happiness..."
>
> Too much dignity cannot well be given to that declaration. That it was intended to cover a

broad field not practicable to circumscribe by any specific limitation or limitations cannot well be doubted. This court has given thereto its proper place in unmistakable language, particularly in recent decisions... (cite)... Doubtless the fathers of the constitution foresaw the likelihood and danger of the security of personal rights which the fundamental law was intended to firmly entrench with the judiciary as its efficient defender, being jeopardized at times by excessive regulation of the ordinary affairs of life, and with that in view incorporated in the fundamental law at Sec. 22, Art. I that admonition so full of meaning:

> "The blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue and by a frequent recurrence to fundamental principles." (Emphasis added)

The Court went on to say (p. 107):

> "It is a judicial function to define the proper subjects for the exercise of the police power... it must be to decide as to any enactment, whether it really relates to a legitimate subject or under the guise of doing so violates rights of persons and property... It is not every enactment which will to some extent promote the public health, comfort or convenience which is legitimate. Otherwise the way would be open for legislative interference with the ordinary affairs of life to an extent destructive of many of the most valuable purposes of civil government."

The Redmon case is followed in a long line of Wisconsin decisions concerning the police power. The Supreme Court of the State however, in its decision, unlike the Circuit Court, neither relied on nor referred to Redmon or to Sec. 22, Art. I of the State Constitution or on the many cases following the same, thus not apparently following the established state law in its decision. Such a decision cannot defeat the jurisdiction of the United States Supreme Court, N.A.A.C.P. v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.ed. 2d 1488 (1958); Titus v. Wallick, 306 U.S. 282, 59 S.Ct. 557, 83 L.ed. 653 (1939), and leaves the inescapable conclusion that the decision did rest on Federal constitutional grounds.

CONCLUSION

For the above reasons, appellant prays that jurisdiction be noted, or alternatively, certiorari granted pursuant to 28 U.S.C. 2103.

Respectfully submitted,

S.A. SCHAPIRO

Attorney for Appellant